IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 21, 2000 Session

LINDA G. POPER, BY HUSBAND AND CONSERVATOR, THOMAS C. POPER, ET AL. v. JOSEPH E. ROLLINS, ET AL.

An Appeal from the Circuit Court for Shelby County
No. 71518-2 T.D. James F. Russell, Judge

No. W2000-00391-COA-R3-CV - August 15, 2001

This is an uninsured motorist insurance case. The plaintiff's wife died as a result of injuries suffered in an automobile accident involving multiple vehicles. The husband sued several defendants for wrongful death. He settled out of court with all but one defendant. The single remaining defendant had only $10,000 in liability insurance coverage. The insurance company of the remaining defendant offered to settle for the full policy limit. The husband had an uninsured motorist insurance policy with $100,000 in coverage, and he sued his uninsured motorist insurance carrier for damages beyond the policy limits of the remaining defendant's insurance. The uninsured motorist insurance carrier refused, asserting that the husband had collected more than the $100,000 uninsured motorist policy limit from the other defendants who had settled with the husband previously. The trial court granted summary judgment to the insurer. On appeal, we affirm, finding that, under Tennessee Code Annotated § 56-7-1201(d), the uninsured motorist insurance carrier is entitled to offset the amounts collected from the defendants who had previously settled.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which DAVID R. FARMER, J. and HEWITT P. TOMLIN, JR., SP. J., joined.

Berry Cooper, Memphis, Tennessee, for the appellant, Thomas C. Poper.

Nathan W. Kellum, Memphis, Tennessee, for the appellee, Farmers Mutual Insurance Exchange.

Melanie M. Stewart, Memphis, Tennessee, for the appellee, Joseph E. Rollins.

OPINION

This is an uninsured motorist insurance case. In this case, Linda G. Poper was seriously injured in an automobile accident in August 1994 that involved several vehicles. In January 1996,

she died as a result of those injuries. Her husband, Thomas C. Poper, filed suit against the driver of each vehicle for negligence resulting in the wrongful death of his wife. He also sued General Motors Corporation, the manufacturer of his wife's car, asserting products liability.

Poper subsequently settled out of court with all but one of the defendants. He received a total of $530,000 from those settlements, including $400,000 from General Motors. The only defendant with whom Poper did not settle was Joseph E. Rollins. Mr. Rollins's liability insurer provided only $10,000 in coverage, and his insurer offered to settle for the full policy amount.

Poper had an uninsured motorist insurance policy with Farmers Mutual Exchange Insurance ("Farmers"), with policy limits of $100,000. Poper served Farmers with a copy of his lawsuit, asserting that Farmers was liable for the excess loss not covered by Rollins's liability insurance. Farmers denied liability, arguing that Poper had exceeded the policy limits of the uninsured motorist policy because he had collected more than $100,000 from the defendants with whom he had previously settled.

Poper asserted that it was unclear whether Rollins's liability insurance covered the portion of the loss caused by Rollins; therefore, Farmers would be liable for any loss not covered by Rollins's insurance. Poper pointed to the language of his uninsured motorist insurance policy, which stated:

> We will pay all sums which an insured person is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured person . . . .

Poper argued from this that Farmers would be deemed liable if the remaining defendant was the owner of an "uninsured motor vehicle." The policy defined "uninsured motor vehicle" as a motor vehicle:

> a. *To which* the sum of all limits of liability available to the insured person under all valid and collectible insurance policies, bonds, and securities applicable to the bodily injury or property damage is less than the applicable limits shown in the Declarations for uninsured motorists coverage against which the claim is made.

(Emphasis added.) Poper emphasized the phrase "to which," arguing that the "sum of all limits available" must be applicable to Rollins's vehicle.

Farmers moved for summary judgment. Farmers argued, *inter alia*, that Tennessee Code Annotated §56-7-1201(d) cut across the language in the insurance policy, establishing in effect a "cap" by offsetting the amounts of any insurance policies applicable to the injury or death. This statute provides:

> (d) The limit of liability for an insurer providing uninsured motorist coverage under this section is the amount of that coverage as specified in the policy less the sum of the limits collectible under all liability and/or primary uninsured motorist insurance policies, bonds, and securities applicable to the bodily injury or death of the insured. With regard to a claim against a governmental unit, political subdivision or agency thereof, the limitations of liability established under applicable law shall be considered as limits collectible under a liability insurance policy.

Tenn. Code Ann. §56-7-1201(d) (2000). The trial court initially denied Farmers' motion for summary judgment. Farmers then filed a motion to reconsider, and the trial court granted summary judgment in favor of Farmers. From this order, Poper now appeals.

In this case, the essential facts are undisputed. Since only questions of law are involved, we review the trial court's grant of summary judgment *de novo*, with no presumption of correctness. ***See Warren v. Estate of Kirk***, 954 S.W.2d 722, 723 (Tenn. 1997).

On appeal, Poper contends that the language of his uninsured motorist policy with Farmers clearly obligates Farmers to pay for any excess loss not covered by Rollins's liability insurance. He notes that the policy insures against damage caused by the "owner or operator of an uninsured motor vehicle," which is defined as a vehicle "*[t]o which* the sum of all limits of liability available to the insured person . . . is less than the applicable limits" of the policy. (Emphasis added.) Poper argues that the phrase, "to which," means that only the insurance applicable to Rollins's vehicle can be used to offset the total coverage provided by his uninsured motorist policy. Poper notes that the definition of uninsured motor vehicle in his insurance policy closely mirrors the definition provided in Tennessee Code Annotated § 56-7-1202(a) (2000).[1]

Poper asserts that, under a comparative fault system, Farmers should not be able to offset its uninsured motorist coverage by the amounts collected from other defendants. He notes that Tennessee has abandoned the law of joint and several liability in favor of a modified comparative fault system in which each defendant is liable only for the portion of the plaintiff's loss he or she caused, so long as the plaintiff's negligence in causing the loss does not outweigh the defendant's negligence. ***See Sherer v. Linginfelter***, 29 S.W.3d 451, 455 (Tenn. 2000); ***McIntyre v. Balentine***,

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[1]This statute states:

> a) For the purpose of this coverage, "uninsured motor vehicle" means a motor vehicle whose ownership, maintenance, or use has resulted in the bodily injury, death, or damage to property of an insured, and for which the sum of the limits of liability available to the insured under all valid and collectible insurance policies, bonds, and securities applicable to the bodily injury, death, or damage to property is less than the applicable limits of uninsured motorist coverage provided to the insured under the policy against which the claim is made.

Tenn. Code Ann. § 56-7-1202(a) (2000).

833 S.W.2d 52, 57 (Tenn. 1992). Poper argues that since each defendant is liable for his or her own loss, the other defendants are not liable for the loss caused by Rollins, and the settlement amounts received from the other defendants should not offset the amount of uninsured motorist coverage provided by Farmers.

Farmers contends that, regardless of the language used in the uninsured motorist policy, Tennessee Code Annotated §56-7-1201(d) in effect "caps" Farmers' liability, providing that the uninsured motorist coverage is offset by the sum of any insurance limits "applicable to the bodily injury or death of the insured." Farmers notes that this statute has not been modified since Tennessee's adoption of comparative fault and asserts that application of the statute is unaffected by the doctrine of comparative fault.

In support of its argument, Farmers cites ***Erwin v. Rose***, 980 S.W.2d 203, 207-208 (Tenn. Ct. App. 1998). In ***Erwin***, the jury found the defendant to be 84% responsible for the plaintiffs' loss, which totaled $1,000,000. ***See Erwin***, 980 S.W.2d at 205. The plaintiffs had an uninsured motorist policy for $100,000, and they sued their uninsured motorist carrier for the excess loss not covered by the defendant's $25,000 liability policy. ***See id.*** This Court held that the insurer was entitled to offset the $100,000 policy maximum by amounts received from other defendants, under the language of the uninsured motorist policy. ***See id.*** at 208-09. In so holding, the Court commented:

> While ***McIntyre v. Balentine*** did abolish joint liability, we do not think it changed the statutes that govern uninsured-underinsured motorist insurance or the private contract policy provisions that have been consistently construed to give the insurance company the credit it seeks in this case.

Id. at 207.

Poper rightly notes that ***Erwin*** is distinguishable from the facts of the case at bar, because the policy in ***Erwin*** included broader language that permitted the deduction of sums recovered from other defendants. ***See id.*** at 208. However, Tennessee Code Annotated § 56-7-1201(d) clearly provides that the limit of liability for uninsured motorist coverage is offset by "the sum of the limits collectible under all liability . . . insurance policies, . . . *applicable to the bodily injury or death of the insured*." Tenn. Code Ann. § 56-7-1201(d) (2000). (Emphasis added.) As noted in ***Erwin***, the doctrine of comparative fault adopted in ***McIntyre v. Balentine*** did not change this statute. ***Erwin***, 980 S.W.2d at 207. It is well-established that the statutes governing an insurance policy become part of the policy, overriding any policy provisions to the contrary. ***See Sherer***, 29 S.W.3d at 453-54.[2] Therefore, the broad language of Section 56-7-1201(d) cuts across the language of Poper's policy, and limits the uninsured motorist insurer's liability to the policy amount offset by the sum of all policy limits collectible and applicable to the death of the insured. Consequently, under Section 56-

[2] In ***Sherer***, the Tennessee Supreme Court expressed no opinion on the statute at issue in this case, Tennessee Code Annotated § 56-7-1201(d), and stated that it expressed no opinion on the holding in ***Erwin***. ***See Sherer***, 29 S.W.3d at 454.

7-1201(d), Farmers is allowed to offset its policy coverage by the amounts collected from other defendants. Under these circumstances, the trial court did not err in granting summary judgment to Farmers.

The decision of the trial court is affirmed. Costs on appeal are taxed to the Appellant, Thomas C. Poper, and his surety, for which execution may issue if necessary.

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HOLLY KIRBY LILLARD, JUDGE